In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 261

SPENCER H. ROBLEY, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Following a non-jury trial, petitioner was convicted in the United States District Court for the Central District of California of refusing to submit to induction into the Armed Forces, in violation of 50 U.S.C. App. 462 (1 R. 2–4, 30).[1] On January 13, 1969, he was sentenced to three years' imprisonment (1 R. 31). The court of appeals affirmed (Pet. App. A1–A2).

In March 1964, petitioner submitted to his local Selective Service board a completed questionnaire in which he stated that he was a conscientious objector

[1] "1 R." and "2 R." refer to the two-volume transcript of record. "S.S.F." refers to petitioner's Selective Service file (a government trial exhibit), a copy of which is on file in the Clerk's office.

401-689—70

(1 R. 10; S.S.F. 7). The board promptly mailed him an SSS Form 150 (Special Form for Conscientious Objector) to fill out and submit in substantiation of his claim. Petitioner did not complete and return the form because after looking through it he doubted that he qualified for CO status (1 R. 10; 2 R. 28–29, 33; S.S.F. 11). A few months later the board mailed him a second SSS Form 150 but this also was not returned. Thereafter, petitioner was classified III–A (deferred for dependency) (S.S.F. 11).

In October 1966, petitioner's local board was notified by his wife that petitioner had deserted her and their infant daughter, that she did not know where he was and that she had not seen or heard from him for eleven months. The board then reclassified petitioner I–A and the following month ordered him to report for a pre-induction physical examination on December 5, 1966 (S.S.F. 11, 18). He failed to report as directed. In April 1967, following unsuccessful efforts by the board to ascertain petitioner's whereabouts, the board declared him delinquent for failing to report for the scheduled physical examination (S.S.F. 11, 26–38, 40). On May 17, 1967, in a directive mailed to him at his last known address, he was ordered to report for induction, as a delinquent, on June 13, 1967. He did not report (S.S.F. 11, 41, 48).

In July 1967, the local board reported petitioner to the United States Attorney for prosecution. Subsequently he was located by the F.B.I. and, at the F.B.I.'s suggestion, he communicated with the board and informed it of his current address. Further prose-

cutive action was thereupon discontinued (S.S.F. 11, 53). At the local board's request, petitioner submitted a completed current information questionnaire in February 1968 (S.S.F. 55–57). In March of that year, he requested the board by letter to "include in [his] file" that he was then the sole support of his widowed mother and of a younger brother and that he was contributing the support of his daughter. He did not ask to be reclassified or that his classification be reopened (S.S.F. 60).

On April 25, 1968, in a directive which referred to the induction order of May 17, 1967, and which reminded him of his "continuing duty to report for induction" under 32 C.F.R. 1642.15,[2] petitioner was ordered to report for induction on April 30, 1968 (S.S.F. 65).[3] He did not report. On June 17, 1968, in a similar order, he was again directed to report for induction, on June 25, 1968 (S.S.F. 72). On the latter date he reported for but refused to submit to induction (2 R. 37–38; S.S.F. 73–75).

In October 1968, three and a half months later, petitioner for the first time filed with the local board an executed SSS Form 150 (2 R. 29–32).

---

[2] 32 C.F.R. 1642.15 provides that "[r]egardless of the time when or the circumstances under which a registrant fails or has failed to report for induction pursuant to an Order to Report for Induction (SSS Form 252) * * *, it shall thereafter be his continuing duty from day to day to report for induction * * *."

[3] The accompanying "Delivery List" (SSS Form 261) stated that petitioner was to be inducted as a "delinquent registrant" (S.S.F. 66).

1. Petitioner contends that he was denied due process by the failure of the local board to "process his claim" to a hardship deferment, based on his March 1968 letter advising the board that he was the sole support of his mother and a brother and that he was contributing to the support of his daughter (Pet. 14). This letter, however, was mailed after petitioner had been ordered to report for induction. It was not accompanied by any documentation or supporting letters to substantiate petitioner's assertions. In these circumstances, the board was precluded from reopening under 32 C.F.R. 1625.2, since petitioner's letter was not alone sufficient to warrant a finding that "there [had] been a change in the registrant's status resulting from circumstances over which the registrant had no control" (32 CFR 1625.2). Moreover, as the court below observed, since petitioner neither requested nor made any other claim to III–A reclassification (Pet. App. A1), there was no "claim" for the board to "process." *United States* v. *Weldon*, 422 F. 2d 800, 801 (C.A. 9); *United States* v. *Whitaker*, 395 F. 2d 664, 665–666 (C.A. 4); *Taylor* v. *United States*, 285 F. 2d 703, 704 (C.A. 9); *United States* v. *Simmons*, 213 F. 2d 901, 910–911 (C.A. 7), reversed on other grounds, 348 U.S. 397.

2. Petitioner also asserts here for the first time that the original order directing him to report for induction (*i.e.*, the order of May 17, 1967) was invalid because it was predicated on a declaration of delin-

quency (Pet. 15). He relies on this Court's decision in *Gutknecht* v. *United States,* 396 U.S. 295.[4] However, *Gutknecht* is clearly distinguishable. In that case, the registrant was declared delinquent for failure to maintain possession of his draft cards (396 U.S. at 298), and as a consequence of the declaration of delinquency was ordered to report for induction substantially sooner than he otherwise would have been (396 U.S. at 299, 317–318). Here, however, the declaration of delinquency was occasioned by petitioner's failure to report for a pre-induction physical examination. Since normally such examination directly precedes issuance of the order to report for induction and signifies that the scheduled induction is imminent, the contention here that issuance of the induction order was accelerated by the act for which petitioner was declared delinquent is wholly unfounded. In this connection, it is relevant to point out that the directive of June 17, 1968, which petitioner was charged with violating, though derivatively based on the order of May 17, 1967, was issued more than a year after that date.

3. Petitioner's claim to classification as a conscientious objector was allegedly rejected (Pet. 7) under 32

[4] *Gutknecht* was decided January 19, 1970, at which time the instant case was pending before the court of appeals. The decision below in this case was rendered March 3, 1970. Although petitioner petitioned the court of appeals for rehearing (Pet. App. A2), he did not then raise the issue he now seeks to litigate before this Court. (A copy of the petition is on file in the Clerk's office.)

C.F.R. 1625.2, which provides that a local board shall not reopen a registrant's classification after an induction notice has been sent, unless that board specifically finds that there has been a change in status resulting from circumstances over which he has no control. This provision has uniformly been interpreted as not allowing reopening unless the registrant's change in status occurred *after* receipt of the induction notice. Cf. *United States* v. *Kanner,* 416 F. 2d 522, 525 (C.A. 9); *Dugdale* v. *United States,* 389 F. 2d 482, 484 (C.A. 9). Here petitioner received from his local board not one, but two conscientious objector forms prior to the mailing of his induction notice and returned neither. Moreover, he made no claim to CO status even after receiving his orders to report. Indeed, it was not until several months *after refusing to submit to induction* that he first filed a completed SSS Form 150.

As we stated in our memorandum in *Posner* v. *United States,* No. 151, this Term, pp. 5–6, "[d]espite their disagreement on the late crystallization issue, the various courts of appeals are in accord that in this situation, when a timely claim is not made, exemption may be denied on that basis alone." Cf. *Straight* v. *United States,* 413 F. 2d 263, 264 (C.A. 9); *Blades* v. *United States,* 407 F. 2d 1397, 1399 (C.A. 9); *United States* v. *Stoppelman,* 406 F. 2d 127, 131–133 (C.A. 1), certiorari denied, 395 U.S. 981. We recognize, however, that there is presently pending before this Court in *Ehlert* v. *United States,*

No. 120, this Term,[5] the issue whether the maturation of conscientious objector beliefs after the receipt of an induction notice constitutes a circumstance beyond the control of the registrant entitling him to reopening. While in our view, that issue is not presented by this petition for the reason stated above, the Court may wish to defer action here pending its decision in *Ehlert*.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

AUGUST 1970.

---

[5] Petitioner's contention that Congress, in creating the conscientious objector classification, "nowhere, even by implication, set a deadline for its presentation" (Pet. 4), is based on a misreading of the dissent in *Ehlert*. The *Ehlert* dissent in fact expressed concern that a claim be timely made. It recognized that ~~["]the~~ enforcement of orderly procedures may well require default to be imposed for failure of a registrant to claim in timely fashion." Moreover, it observed that in evaluating a conscientious objector claim the board must consider whether the belief "[d]id * * * in fact crystallize after receiving notice of induction and thus constitute a *change* in status." (422 F. 2d at 339 and n. 3). See government's memorandum in *Posner* v. *United States*, *supra*, p. 6 n. 4, a copy of which has been furnished to counsel for petitioner.

U.S. GOVERNMENT PRINTING OFFICE: 1970